No. 23-1429

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

GORE AND ASSOCIATES MANAGEMENT COMPANY, INC.,

Plaintiff-Appellant,

v.

SLSCO LTD.; and HARTFORD FIRE INSURANCE COMPANY,

Defendants-Appellees.

On Appeal from The United States District Court for the District of Puerto Rico
No. 3:19-cv-01650-GAG

BRIEF OF DEFENDANTS-APPELLEES SLSCO LTD. and HARTFORD LIFE INSURANCE COMPANY

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CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure Rule 26.1, Appellees disclose the following information:

Defendant SLSCO Ltd. ("SLSCO") has no parent company, subsidiaries, or affiliates that have issued shares to the public, nor is there a publicly-held corporation owning 10% or more of its stock.

Defendant Hartford Fire Insurance Company ("Hartford"), a Connecticut corporation, is a wholly-owned company of The Hartford Financial Services Group, Inc., a Delaware corporation. The Hartford Financial Services Group, Inc. is a publicly traded corporation that has no parent corporation.

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INTRODUCTION

On September 23, 2021, Plaintiff-Appellant Gore and Associates Management Company, Inc. ("Gore") belatedly sought relief from the stay of proceedings that the District Court had ordered on December 15, 2020 (*Order and Judgment Staying Case*, at Docket Nos. 64 and 65). That Order stated:

> The Court hereby STAYS the pending case given the Court's power to control the disposition of the claims in its docket with economy of time and effort for itself, for counsel, and for litigants. See Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). Plaintiff shall file its claims under the PR Subcontract and USVI Subcontract in the appropriate forums. The parties shall also inform the Court of the disposition of the principal contract claims so that the surety contract claims may proceed.

(Docket No. 64). Contrary to what Gore asserts in its brief,[1] this was not a *sua sponte* stay. Instead, SLSCO and Hartford had expressly and consistently requested a stay,[2] and even Gore had expressly discussed it in its own memoranda below.[3]

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[1] The phrase "*sua sponte*" appears four times in Gore's brief: the table of contents, the statement of issues presented for review, the heading of its first argument, and the main text at the bottom of page 21.

[2] To take but the most salient example, the word "stay" appears, quite literally, in the title of Defendants-Appellees' motion to dismiss: *Motion to Dismiss Plaintiff's Amended Complaint Pursuant to Fed. R. Civ. P. 12(B)(6) or, in the Alternative, for* ***Stay*** *Pending Mediation* (Docket No. 36) (emphasis added). Indeed, almost every filing by Defendants-Appellants contained either an outright request for a stay or a reference to a previous request.

[3] For example, in its *Opposition to Defendants' Motion to Dismiss*, Gore not only discussed Defendants-Appellants' request for a stay, but also went so far as to state that it was "willing to stipulate to a stay of the proceedings [but] only if all parties agree to mediate all of the claims." (Docket No. 28, at 15). And later on, in its

More than sixty days after the entry on docket of the *Order and Judgment Staying Case,* Gore -again, belatedly- sought reconsideration, and when that was denied, sought reconsideration a second time. After the denial of that second motion for reconsideration, Gore filed a mandamus petition asking this Court to reverse the stay. Although, subsequently, some uncertainty arose as to whether the proper vehicle for that request should have been an appeal instead of a petition for mandamus, the result should be the same: this Honorable Court should decline to reverse the stay.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant first presented this matter to this Court on September 23, 2021, by way of a petition for the writ of mandamus, which was docketed and styled as *In Re: Gore and Associates Management Company, Inc.*, No. 21-01762. However, on May 3, 2023, Chief Judge Barron entered an order construing the petition as an appeal and directing the Clerk "to transmit a copy of the mandamus petition to the district court for docketing as a notice of appeal." The appeal was docketed on May 17, 2023, under a new caption and case number; namely, *Gore and*

Opposition to Defendants' Motion to Dismiss First Amended Complaint (Docket No. 37, at 12-13), Gore again spent two full paragraphs responding to Defendants' request for mediation. In sum, Gore's claim that the stay was granted *sua sponte* finds zero support on the record below.

Associates Management Company, Inc. v. SLSCO Ltd.; and Hartford Life Insurance Company, No. 23-1429.

As corrected on May 10, the Chief Judge's Order further states, in pertinent part, as follows:

> This ruling is subject to revisitation by the ultimate merits panel. The notice of appeal should be treated as filed in the district court on the date the mandamus petition was filed in this court. With their briefs in the newly opened appeal, the parties shall fully address all potential sources for this court's jurisdiction, including mandamus, and also should address the proper scope of any appeal. All relevant issues are reserved to the ultimate merits panel. This mandamus proceeding shall remain pending, and resolution of this proceeding and the appeal contemplated herein will be coordinated to the fullest extent possible. So ordered.

In its brief, however, Appellant did not discuss any alternate source of jurisdiction; neither mandamus nor any other. Instead, Plaintiff relied on this Court's authority to hear appeals from the District Court and argued its case pursuant thereto.

In compliance with the Chief Judge's May 10 Corrected Order, Appellees have carefully evaluated the jurisdictional basis for this appeal and, as discussed in greater detail in the body of this brief, have come to the conclusion that this Court lacks jurisdiction under 28 U.S.C. § 1291 to hear this appeal from the judgment staying the action below. Even assuming the date of the mandamus filing should be taken as the date of the notice of appeal, the appeal was untimely filed because significantly more than 30 days elapsed between the entry of Judgment in the District Court and the filing of the "notice of appeal" (*i.e.*, the mandamus petition) and the

appellant had not timely filed a motion under Rule 59 or any other that extends or affects the time to appeal from a District Court Judgment. *See* Fed. R. App. P. 4(a).

COUNTER-STATEMENT OF ISSUES

1. Were the Court to construe this as an appeal, was it timely?

2. Were the Court to construe this as an appeal, did the District Court abuse its discretion in staying the case?

3. Were the Court to construe this case, instead, as it was originally filed –that is, as a petition for the writ of mandamus– have the elements for the issuance of that extraordinary writ been met?

COUNTER-STATEMENT OF THE CASE

Gore has no direct contractual or statutory claim of its own against Defendants-Appellees SLSCO Ltd. ("SLSCO") or Hartford Life Insurance Company ("Hartford"). Instead, it filed this action on the basis of putative claims against SLSCO and Hartford allegedly assigned to Appellant by two Puerto Rico limited liability corporations: Earthwrx, LLC ("Earthwrx") and Uniify of Puerto Rico, LLC ("Uniify"), neither of which is a party to this suit. The claims that Gore alleges it was assigned by Earthwrx and Uniify seek compensation for work those two companies allegedly performed after Hurricane María under two separate *Subcontractor/Vendor General Terms and Conditions* agreements in Puerto Rico

and in the U.S. Virgin Islands. Gore seeks relief both under the agreements and under certain related payment bonds.

Before Gore filed this suit, Uniify had already filed a diversity action in the U.S. District Court for the Virgin Islands, Division of St. Croix. *See*, *Uniify of Puerto Rico, LLC, et al. v. Earthwrx, LLC, et al.*, No.19-cv-00005-WAL-GWC. It was filed on January 25, 2019, and both SLSCO and Hartford were named defendants in that action, which sought amounts allegedly owing under the agreements, as well as under related payment bonds. The claims, in essence, covered half of the claims asserted in the present case. The USVI suit, however, was voluntarily dismissed without prejudice by Uniify in June of 2019, after SLSCO and Hartford had moved to dismiss the Complaint on its merits.

Approximately a month later, on July 7, 2019, Gore filed a diversity action in the U.S. District Court for the District of Puerto Rico against the Defendants in an attempt to exercise the purported rights not only of Uniify, but also of Earthwrx, LLC ("Earthwrx," and, together with Uniify, the "Assignors") that allegedly had been assigned[4] to Plaintiff, in order to collect certain amounts claimed against SLSCO under two *Subcontractor/Vendor General Terms and Conditions* agreements and the corresponding payment bonds issued by Hartford (the

[4] From the start, Defendants-Appellees have reserved their right to question the validity of the assignments of the Assigned Rights. The validity -or lack thereof- of the purported assignment, however, is not presently before this Court.

"Assigned Rights"). As to Uniify, the claims were essentially the same as those Uniify had asserted in its original USVI action a few months earlier.

The Complaint involved separate, multi-tiered contractual relationships between several private and government parties. As alleged by Gore, after Hurricane Maria devastated Puerto Rico and the U.S. Virgin Islands, SLSCO participated in the territorial governments' reconstruction programs. (Docket No. 1-1, at ¶¶ 9-11. In Puerto Rico, SLSCO entered in a contract directly with the Puerto Rico Department of Housing ("DOH"), an instrumentality of the Commonwealth of Puerto Rico, to perform emergency reconstruction and repair work in the Island (the "PR Contract"). In furtherance of said contract, SLSCO obtained a payment bond from Hartford, naming the DOH as obligee ("PR Bond"). (Docket No. 1-1).

In the U.S. Virgin Islands, in a separate and completely independent contract, SLSCO was ***sub***contracted by AECOM Caribe, LLP ("AECOM") to perform work in that territory (the "USVI Subcontract" and, together with the PR Contract, "SLSCO Contracts") under a contract that AECOM executed with the Virgin Islands Housing Finance Authority ("USVI Prime Contract"). In furtherance of the USVI Subcontract, SLSCO obtained a second payment bond from Hartford, naming AECOM as the obligee ("USVI Bond" and, together with the PR Bond, "Payment Bonds").

The Complaint further alleged that SLSCO "contracted with [Earthwrx] to provide manpower staffing support" for the work to be performed under the PR Contract and the USVI Subcontract. (Docket No. 1 at ¶ 15.) The Complaint includes "true and accurate" copies of (i) the contract entered into between SLSCO and Earthwrx for work to be performed under the PR Contract ("PR Subcontract") and (ii) under the USVI Subcontract ("USVI Sub-subcontract" and, together with the PR Subcontract, "Earthwrx Subcontracts"). (Docket Nos. 1-2 and 1-3). Gore alleges that, as an assignee of Earthwrx under the Earthwrx Subcontracts, it was entitled to collect $1,402,313.28 of unpaid invoices against Defendants. (Docket No. 1, at ¶¶ 36, 51, 61, and 71). The Complaint did not include any allegation or explanation as to what part of this amount corresponds to the ***PR*** Subcontract and what corresponds to the ***USVI*** Sub-subcontract.

Notwithstanding the fact that each of the two Earthwrx Subcontracts refers to separate and unique relationships, the Complaint proceeded as if the subcontracts were one and the same. Initially, Gore's Complaint also contained a cause of action arising under 40 U.S.C. §§ 3131, *et seq.*, commonly referred to as the Miller Act, demanding payment under the payment bonds.

SLSCO and Hartford moved to dismiss the initial complaint (Docket No. 20), among other reasons because the contracts at issue did not fall within the purview of the Miller Act. Defendants-Appellees explained that the Miller Act did

not apply to any claims with respect to the Puerto Rico Subcontract because it was not a contract regarding "a public building or a public work of the Federal Government," and also did not apply to any claims with respect to the USVI Subcontract because SLSCO was not the prime contractor. *Id.* Gore filed an opposition (Docket No. 28), but nine days later moved for leave to amend the complaint a first time "to remove Count II, Payment Bond Claim Pursuant to the Miller Act, 40 U.S.C. § 3133." (Docket No. 29). The Court granted leave, and the First Amended Complaint was filed (Docket No. 31).

SLSCO and Hartford responded to the First Amended Complaint by filing a new motion to dismiss (Docket No. 36), which, after opposition from Gore (Docket No. 37) and reply from Defendants-Appellees (Docket No. 45), the District Court granted in part and denied in part (Docket No. 47). In particular, the District Court dismissed *without* prejudice the claims that had been assigned by Earthwrx, directing that Gore file those claims in the fora that had been chosen in the applicable contracts between Earthwrx and SLSCO (Docket No. 47).

In that order, however, the District Court also noted that "the claims under the PR bond and the USVI bond may be dependent on the PR Subcontract and USVI Subcontract claims," and therefore ordered that "both parties shall file simultaneous legal memoranda to Court on this issue, on or before November 22, 2020." *Id.* Upon receiving the corresponding memoranda from both parties (Docket

Nos. 59 and 60), on December 15, 2020, the District Court issued the *Order and Judgment Staying Case* (Docket Nos. 64 and 65).

For more than two months thereafter, there was no further activity on the District Court's docket. Gore neither moved for reconsideration nor filed an appeal from the *Judgment Staying Case*. On February 23, 2021, however, Gore filed a *Motion to Lift the December 15, 2020 Stay and for Leave to File a Second Amended Complaint and Incorporated Memorandum Of Law* (Docket No. 66). After opposition from Defendants-Appellees, that motion was denied on March 10, 2021 (Docket No. 70). On April 7, 2021, Gore filed a motion for reconsideration as to the order at May 10 order. In turn, the April 7 motion was denied on August 24, 2021. The petition for mandamus was filed with this Honorable Court on September 23, 2021, and docketed as *In Re: Gore and Associates Management Company, Inc.*, Case No. 21-1762.

SUMMARY OF ARGUMENT[5]

Jurisdiction

[5] SLSCO and Hartford have raised additional arguments on the merits against Gore's claims, as found in their pleadings, motions and briefs below. But the matter before this Honorable Court is merely a purported appeal from a stay order, nothing more, which should not require this Court to enter into a discussion of the merits of Gore's claims. Defendants-Appellees therefore reserve their right to develop such arguments if and where necessary.

Construed as an appeal, this case should be dismissed for lack of jurisdiction because it was untimely filed. For purposes of such construal, the merits judgment was the *Judgment Staying Case* entered on December 15, 2020. However, the petition was filed on September 23, 2021, more than nine months later. Moreover, even though that filing was made within thirty days of the entry of an order denying a motion for reconsideration, that was not the first, but rather the second motion for reconsideration. It is black-letter law in this circuit that second motions for reconsideration do not further extend the time to appeal. *See Acevedo-Villalobos v. Hernández,* 22 F.3d 384, 390 (1994) ("[T]he untimely second motion to reconsider could not enlarge the time for filing a notice of appeal from the order denying the original motion to reconsider") (*citing Feinstein v. Moss*, 951 F.2d 16, 18 (1st Cir. 1991)). Moreover, and in any case, the first motion for reconsideration was also untimely because it was filed more than two months after the entry of the *Judgment Staying Case*. *See* Fed. R. App. P. 4(a)(4). Alternatively, the motion for leave to amend the complaint yet again was not properly presented to the District Court because Gore did not first obtain relief from the December 15 judgment.

Judgment Staying Case

Even if the appeal had been timely, the Court should affirm the court below because it did not abuse its discretion in ordering the stay. It is telling that Gore's briefs --both below and in this court-- constantly blur the distinction between itself

and its assignors. For example, in its own petition for mandamus, Gore stated that "[t]he District Court has ordered the intermediary contractor, a defunct company, to complete contract litigations in multiple other forums before allowing Petitioner to make its bond claims."[6] That is simply not true. It was Gore that was ordered to complete those litigations, not Earthwrx. Gore, after all, claims to be the assignee of claims belonging to intermediatory contractors such as Uniify and Earthwrx. If that is true, then Gore did not depend on them in any way in order to pursue what have been its own claims since at least July of 2019. It was its own decision to let the last two years go by without moving forward with the litigation as ordered by the District Court, and cannot be heard now to complain that the partial stay entirely prevented it from obtaining relief.

This Honorable Court lacks jurisdiction to entertain this case as an appeal because it was not timely filed. Gore has waived any argument it might have had that this matter should be construed as a mandamus petition.

Even if it had not waived the argument, the Court should decline to issue this extraordinary writ. Gore did have adequate means to attain relief by filing a timely

[6] And on appeal, Gore's brief contains statements such as that "Gore ***and Uniify*** are owed a debt for their services," Gore Br. at 27 (emphasis added), or that "Uniify does not control Earthwrx and ***cannot force Earthwrx*** to cooperate in the bringing and prosecution of its claims against SLSCO," id. at 13 (emphasis added). Those are *non-sequiturs*, for if Gore is, in fact, the valid assignee of Earthwrx and Uniify's claims, then it can proceed with those claims on its own and does not need their participation or cooperation.

appeal from the December 15, 2020 *Order and Judgment Staying Case*. Also, Gore remains free to attempt to persuade the District Court that, for example, there are new circumstances that counsel lifting the stay. In addition, this case does not pose any special risk of irreparable harm to Gore, given that its claims are for money, it remains free to pursue its claims in other forums, and will be able to reactivate the stayed claims later on. And it was not unreasonable for the District Court to conclude that Gore's proposed solution of informally "dropping" those other claims was not sufficient to allay its concerns about the potential for inconsistent rulings.

ARGUMENT

A. This Honorable Court lacks jurisdiction to entertain this case as an appeal because it was not timely filed and, in any case, because the District Court did not effectively surrender jurisdiction over the suit.

1. Gore has waived any argument it might have had that this matter should be construed as a mandamus petition.

Gore did not seek reconsideration of this Court's May 10 order directing that the case be docketed as an appeal. It also failed to comply with the Chief Judge's admonition in the May 10 order that, "[w]ith their briefs in the newly opened appeal, the parties shall fully address all potential sources for this court's jurisdiction, including mandamus, and also should address the proper scope of any appeal." In its brief, however, Gore simply asserted, as part of its jurisdictional statement, that the Court enjoys jurisdiction under 28 U.S.C. § 1291. Consequently, Gore should be

deemed to have waived any arguments it might otherwise have raised with respect to the appropriateness of mandamus or any other alternate source of jurisdiction.

2. Construing the petition as an appeal, it was untimely.

The May 10 Corrected Order cites to precedent that, under certain circumstances, permits this Honorable Court to construe a petition for mandamus as an appeal. *See*, *In re Urohealth Sys., Inc.*, 252 F.3d 504, 507-08 (1st Cir. 2001). But *Urohealth* does not exempt Gore from satisfying the jurisdictional prerequisites of an appeal, the most important of which is that it be timely filed.

The order that, for purposes of such construal, would be treated as a merits judgment was the *Judgment Staying Case* entered on December 15, 2020 (Docket No. 65). But after that, Gore waited for more than two months before filing, on February 23, 2021, its *Motion to Lift the December 15, 2020 Stay and for Leave to File a Second Amended Complaint and Incorporated Memorandum Of Law* (Docket No. 66). There are at least two problems with this.

First, the rule governing amendments, Fed. R. Civ. P. 15(a)(2), is inapplicable because Plaintiff failed to seek relief from the Order and Judgment. "The law in this circuit is clear that a district court may not accept an amended complaint after judgment has entered unless and until the judgment is set aside or vacated under Rules 59 or 60." *Feliciano-Hernandez v. Pereira-Castillo*, 663 F.3d 527, 538 (1st Cir. 2011); *see also, Fisher v. Kadant, Inc.*, 589 F.3d 505, 508-09 (1st Cir. 2009)

("As long as the judgment remains in effect, Rule 15(a) is inapposite."). The liberal standard that attaches to Fed. R. Civ. P. 15(b) motions to amend "does not apply" to such motions made after judgment. *See, U.S. ex rel. Ge v. Takeda Pharm. Co.*, 737 F.3d 116, 128 (1st Cir. 2013). And Gore did not seek relief from the December 15 judgment.

Second, although the word "reconsideration" is not used in that motion, that was clearly Gore's intent, given that it employed the same arguments that it had put forward in its *Memorandum* (Docket No. 60, at 5-6). But it was untimely, and raising the same arguments does not suffice to allow Gore to then turn the denial of that first motion – purportedly for lift of stay but in reality for reconsideration – into a new judgment from which it could then appeal.

Yet that is what Gore attempted to do when its motion was denied on March 10, 2021 (Docket No. 70). On April 7, 2021, Gore filed a *second* motion for reconsideration, this time from the order at Docket No. 70. That second motion for reconsideration was then denied on August 24, 2021. The petition for mandamus was filed on September 23, 2021, less than 30 days after the denial of the second motion for reconsideration, but more than nine months after the entry of the *Judgment Staying Case*. And as noted earlier, the first motion for reconsideration – the motion for lift of stay filed in February, was filed too late to extend the time to appeal from the December 15 judgment.

Moreover, even if the motion for lift of stay could somehow have extended the time to appeal, it is black-letter law in this circuit that second motions for reconsideration do not further extend the time to appeal. *See*, *Acevedo-Villalobos*, 22 F.3d at 390 ("Because plaintiffs' second Rule 59(e) motion to reconsider was, in reality, a motion to reconsider the judgment dismissing the complaint, and it was untimely (not served within 10 days of entry of the judgment), the district court was without jurisdiction to grant it").

Tellingly, Appellant's brief does not discuss the timeliness of its appeal at all. Appellant makes no effort to explain the time elapsed between the *Judgment Staying Case* and its first motion for reconsideration (which Appellant styled as a motion for lift of stay), much less the time between such events and the filing of the "notice of appeal." Appellant has waived any arguments regarding the timeliness of its appeal and the appeal should be dismissed as untimely.

3. In the alternative, the *Judgment Staying Case* did not effectively surrender jurisdiction over the suit.

The District Court's *Judgment Staying Order* did not dismiss any claim, with or without prejudice, but also did not surrender jurisdiction over this suit. That is critical because, as this Court explained in *Urohealth*,

> The Supreme Court has held that a district court's stay order is appealable as a "final decision" under 28 U.S.C. § 1291 if the purpose of the stay is to effectively surrender jurisdiction of the federal suit to the state court. There, the district court stayed the federal proceedings because the state and federal actions involved an identical issue. . . .

> The Court held that the district court's stay order was appealable, stating: "a stay of a federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata."

In re Urohealth Sys., Inc., 252 F.3d 504, 508 (1st Cir. 2001) (internal citations omitted; citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 & n. 11 (1983)). The claims that Gore was ordered to litigate are those between Earthwrx and Defendants-Appellees. But Gore has consistently asserted that any judgment on such claims would **not** constitute res judicata or otherwise affect its ability to recover on the bond claims that it allegedly was assigned by Uniify.

Putting aside for the moment the question whether Gore's assertion is correct, the point remains that if its bond claims would be unaffected by the Earthwrx litigation, then Gore cannot argue that the District Court's stay was effectively surrendering jurisdiction over this case. To the contrary, the stay was just a stay, and is subject only to abuse of discretion review – a standard that Appellant does not meet.

B. Even if Gore had not waived any argument that this case should be evaluated as a petition for the writ of mandamus, the Court should decline to issue this extraordinary writ.

The decision challenged by Gore is, by its nature, discretionary, and the writ of mandamus is not well-fitted to the purpose of reviewing such decisions. The applicable standard for the issuance of the writ of mandamus was recently restated by this Honorable Court:

> The writ of mandamus has "stringent requirements," . . . and is "generally thought an inappropriate prism through which to inspect exercises of judicial discretion,". . . . "'[O]nly exceptional circumstances amounting to a judicial "usurpation of power,"' or a 'clear abuse of discretion,' 'will justify the invocation of this extraordinary remedy.'" Before mandamus can be granted, petitioners must show that there is no other adequate means to attain their desired relief and that they have a "clear and indisputable" right to issuance of the writ. . . . Further, the court issuing the writ, acting within its discretion, "must be satisfied that the writ is appropriate under the circumstances."

Da Graca v. Souza, 991 F.3d 60, 4 (1st Cir. 2021) (internal citations omitted). The Court further qualified the standard, explaining:

> Supervisory mandamus "is available when 'the issuance (or nonissuance) of [a district court] order presents a question about the limits of judicial power, poses some special risk of irreparable harm to the [party seeking mandamus], ***and*** is palpably erroneous.'" . . . . At least one of the necessary conditions for supervisory mandamus is not met here, so we do not discuss the others.

Id. (emphasis added; internal citations omitted).

This case does not rise to a level justifying the use of this writ. First, as the May 10 order itself shows, Gore did have adequate means to attain relief; namely, it could have timely filed an appeal from the December 15, 2020 *Order and Judgment Staying Case*. That Gore did not seek such relief is no fault of anyone but its own, and as argued above, its attempt to reopen that door must fail.

Second, Gore does not have a "clear and indisputable" right to the writ. Gore remains free to attempt to persuade the District Court, for example, that there are new circumstances that counsel lifting the stay. Whether such an attempt would be

successful is an open question. On the one hand, the stay has been in place for an extended amount of time. On the other, the stay's duration is the result of Gore's ***own*** decision not to comply with the District Court's direction that it pursue litigation in other fora. Either way, however, that is a question that should be decided by the District Court, not this Honorable Court.

Third, this is not a case posing any special risk of irreparable harm to Gore. In that regard, this is a case involving money, and it is clearly established that economic harm is almost never considered irreparable for purposes of equitable relief. *See, Sampson v. Murray*, 415 U.S. 61, 90 ("[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury."). Moreover, it is hard even to conceive of this as a case involving economic loss given that the District Court was expressly prodding Gore to pursue its claims. It was told to pursue them in another forum, admittedly, but that is a far cry from the sort of deprivation that might give rise to a finding of irreparable harm.

Fourth, a further distinguishing feature of this case is that, although Gore in its motion for lift of stay indicated that it was proceeding only on the bond claims it was allegedly assigned by Uniify, it neither cited to Rule 41(a)(2)'s provisions with regard to voluntary dismissals after an answer has been served, nor addressed any of the considerations underlying Rule 41(a)(2). Instead, Gore seems to have proceeded under the assumption that it would be sufficient, for purposes of dismissal, that it

had silently dropped the remaining claims, without squarely addressing the question whether the implicit dismissal would be with or without prejudice. A *sub silentio* voluntary dismissal of claims ***without*** prejudice, where an answer to the amended complaint was already on file, would not have resolved the concerns that led the District Court to issue the *Order and Judgment Staying Case*. To the contrary, the very possibility that those "dropped" claims might be revived by Gore later on in the case, thereby generating again the potential for inconsistent rulings that had convinced the District Court to issue the stay in the first place, was sufficient reason to deny the motion for lift of stay.

CONCLUSION

For the foregoing reasons, Appellants' Petition for the Writ of Mandamus, whether construed as an appeal or not, should be denied and the judgment of the District Court affirmed.

Dated: October 10, 2023.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This *Brief* complies with the type-volume limitations of Fed. R. App. P. 5(c)(1) and 32(c)(2) because it contains 4,483 words, excluding the sections exempted by Rule 32(7)(B)(iii), as calculated by the automatic word count function of Microsoft Word.

2. This *Brief* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) since it has been prepared in a proportionally spaced typeface in a 14-point Times New Roman font.

/s/Salvador J. Antonetti-Stutts
Salvador J. Antonetti-Stutts

CERTIFICATE OF SERVICE

We hereby certify that on October 31, 2023, a true and correct copy of the foregoing *Brief* was filed electronically with the United States Court of Appeals for the First Circuit by using the CM/ECF system and was served via email to all counsel of record, pursuant to Fed. R. App. P. 25(c)(1).

/s/Salvador J. Antonetti-Stutts
Salvador J. Antonetti-Stutts